

Town of Hampton



December 14, 2015

Norman Silberdick, Chairman
William A. Hartley, Vice Chairman
John M. Sovich
John R. Troiano
Stephen Falzone

To the Hampton Trustees of the Trust Funds:

The Hampton Board of Selectmen are writing to you pursuant to this Board's authority under RSA 41:9, VI, "to ensure the safeguarding of all Town assets and properties," to urge that the Trustees take immediate action to respond to the November 20, 2015 letter of Thomas J. Donovan, Director of Charitable Trusts of the New Hampshire Attorney General's Office.

- The November 20, 2015 letter indicates that "fraudulent conduct" on the part of Mackensen & Company has occurred, and calls upon trustees of all Towns involved to conduct a "fact intensive inquiry" to determine whether their municipalities "missed out on a higher rate of return with another investment advisor by switching to or staying with Mackensen & Company."

To date, you have apparently done nothing to initiate this inquiry.

- The November 20, 2015 letter indicates "you will need to consult town counsel on that point and on whether other opportunities for relief may exist."

To date, you have not sought to consult with Town Counsel.

- Director Donovan's letter states that "In light of the [SEC] sanctions, trustees do have a fiduciary responsibility to review their investment relationship with Mackensen & Company. They should look at their returns and perhaps seek a meeting with Mr. Mayes."

No such meeting has occurred or been scheduled, which would need to be in public in order to comply with the Right to Know Law under RSA 91-A: 2. At the Selectmen's meeting on November 9, 2015 some of you indicated that if Warren Mackensen still had involvement or an income stream from Mackensen & Company that you would not have wanted to continue your relationship with Mackensen & Company. The next to the last paragraph of the November 9, 2015, letter provides some, but not all of the particulars as to Warren Mackensen's remaining ties with Mackensen & Company. Additional questions still needing to be answered by Mr. Mayes are as follows:

1. Is Mr. Mackensen in fact still serving on the Mackensen & Company Board of Directors, and if so, is he being paid anything for doing so?
 2. If so, does Mr. Mackensen exercise any say over how the Town's \$20 million in trust funds are invested?
 3. Does Mr. Mackensen still own any percentage interest in National Advisors Trust Company, FSB with whom all \$20 million of Hampton's Trust Funds are invested?
 4. Is Mr. Mackensen himself receiving an income stream as part of the buyout by Mr. Mayes of Mr. Mackensen's ownership of Mackensen & Company?
 5. What are the exact terms of the ongoing buyout by Mr. Mayes of Mr. Mackensen's interest?
 6. Who is paying the \$100,000 in fines under the SEC's September 3, 2015 Order as between Mackensen & Company and Warren Mackensen, who are jointly responsible to pay it.?
 7. When is the buyout of Warren Mackensen by David Mayes to be completed under the terms of the buyout?
 8. Does Mackensen & Company have a separate compliance officer who is independent of its principals?
- Director Donovan's November 20, 2015 letter notes his office's concerns with the solvency and continued suitability of the investment that Mackensen & Company uses with municipalities, and states "you should separately seek these assurances on behalf of your own municipality, should you decide to continue to do business with Mackensen & Company."

So far, from your e-mail or correspondence or from newspaper articles, your Chairman's approach to the matter has been to put this [SEC] issue behind you as quickly as possible (Silberdick e-mail to Mayes dated October 8, 2015) and to take a vote to show support for Mackensen & Company (Hampton Union Article, November 6, 2015 edition). This focus on the well-being of Mackensen & Company is misplaced. Your focus should be upon carrying out your fiduciary responsibilities to the Town.

Director Donovan's November 20, 2015 letter makes it clear: your responsibilities go way beyond determining whether to continue your relationship with Mackensen & Company. His letter is a call for more than business as usual. You should not be sitting back and waiting until your regular quarterly meeting on January 19, 2015 to commence the action items set forth in the November 20, 2015 letter. You need to act openly to assure the public that its \$20 million in trust funds are safe, in good hands, and earning all that they could be earning and in a portfolio in which Warren Mackensen has no interest. You should conduct your meetings at a time that can be broadcast on Channel 22 and be fully open to public scrutiny.

The problems with Mackensen & Company have now been exposed through local and statewide news media (Hampton Union, Portsmouth Herald, and Channel 50). If you do not begin immediately to make the necessary inquiries called for by the Attorney General's Office, you will be perceived as endorsing fraudulent conduct.

The resources of the Bureau of Securities Regulation are available to you. You have also consulted with Town Counsel before and may do so again. He has a budget for outside counsel if he feels this specialty area of the law warrants retaining that assistance for you. The time for you to act is now and not two months from the November 20, 2015 letter.

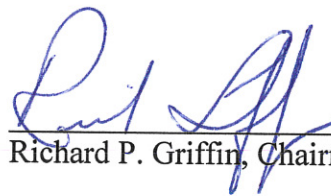
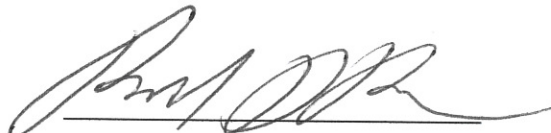
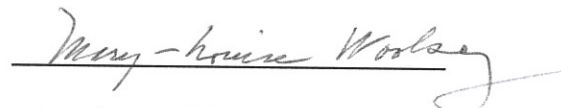
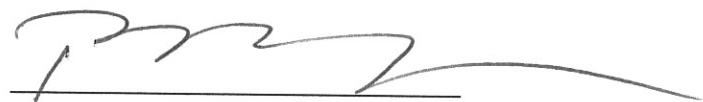

If you do not proceed shortly in response to this letter, this Board will call upon the Attorney General's Office to act as stated in the November 20, 2015 letter: "If we believe that Trustees are not complying with statutory requirements or fiduciary duties with respect to investments, we will counsel and, if necessary, take action against those trustees." (Emphasis added).

Warren Mackensen's actions have gotten the Trustees in hot water before with the Attorney General's Office back in 2010. You should be making every effort now to avoid a return to that position.

Enclosure: November 20, 2015 letter

Respectfully,

Hampton Board of Selectmen


Richard P. Griffin, Chairman
Russell D. Bridle, Vice Chairman
Mary-Louise Woolsey
Philip W. Bean
James A. Waddell

November 20, 2015

Re: Mackensen & Company SEC Sanctions Order

Dear Trustees:

You are no doubt aware that the United States Securities and Exchange Commission issued an administrative order dated September 3, 2015 against Mackensen & Company, Inc. and Warren J. Mackensen. This letter is written because we understand that you are trustees of a municipal fund for which Mackensen & Company, Inc. serves as the investment advisor.

Neither the Charitable Trusts Unit nor any of the municipalities was aware of this proceeding, even though the SEC investigation commenced in 2012. When we found out about it, we made a referral to the New Hampshire Bureau of Securities Regulation. We also met with David Mayes, the president and current owner of Mackensen & Company, together with his lawyer.

With respect to municipal trustees, our primary concern at the CTU is that the trustees follow their fiduciary duties and obey relevant New Hampshire statutes. To that end, we offer seminars and written materials. If we believe that trustees are not complying with statutory requirements or fiduciary duties with respect to investments, we will counsel and, if necessary, take action against those trustees. That said, we do not have the jurisdiction to pursue investment managers or investment companies that work with municipalities, or with any other charitable trusts.

In light of the sanctions, trustees do have a fiduciary responsibility to review their investment relationship with Mackensen & Company. They should look at their returns and perhaps seek a meeting with Mr. Mayes. They may also wish to consult with counsel concerning their options, which could include continuing their relationship with Mackensen & Company, changing investment advisors and/or bringing legal action against the business.

We have been concerned with the solvency and continued suitability of the investments that Mackensen & Company uses with municipalities. We asked those questions of Mr. Mayes and his lawyer, and we were assured that the investments are placed in large mutual fund type products not proprietary to Mackensen & Company. We were told that the funds are all solvent and could easily withstand withdrawals by any or all of the municipalities that have funds

November 20, 2015

Page 2

invested there. You should separately seek those assurances on behalf of your own municipality, should you decide to continue to do business with Mackensen & Company.

We have also been concerned with the nature of the violations outlined in the order, i.e. that Mackensen & Company and Mr. Mackensen misled municipalities in promotional material as to the past performance of the Mackensen & Company portfolio. That is fraudulent conduct. Municipalities may have relied upon those misrepresentations to engage Mackensen & Company. How have the municipalities been harmed by this fraud? It all comes down to money. There are statutory remedies, and they focus on losses, including whether a municipality missed out on a higher rate of return with another investment advisor by switching to or staying with Mackensen & Company. That is a fact intensive inquiry, and will vary among municipalities. We cannot perform that review; you will need to consult town counsel on that point and on whether other opportunities for relief may exist. You might also consult with the Bureau of Securities Regulation.

Finally, we learned something of the continuing relationship between Mr. Mackensen and Mackensen & Company. Mr. Mayes bought the business in 2012, shortly before the SEC investigation began. He is paying Mr. Mackensen over time. Mr. Mackensen has a right to remain on the Mackensen & Company board of directors until he is paid off, and the business name cannot be changed during that timeframe. Mr. Mackensen no longer serves in any other capacity with the business. As you can imagine, the SEC order must be a source of ongoing discussion between Mr. Mayes and Mr. Mackensen. All of this may affect how Mr. Mayes decides to continue his business.

Feel free to contact us if you have any questions.

Very truly yours,

Thomas J. Donovan
Director of Charitable Trusts
(603) 271-3591
tom.donovan@doj.nh.gov

TJD:ab